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July 12, 2010

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: *In re 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*
MB Docket No. 09-182

Dear Ms. Dortch:

By and through their undersigned counsel, Fox Entertainment Group, Inc. and Fox Television Stations, Inc. (together, "Fox") hereby respectfully submit this information in response to the Commission's Notice of Inquiry in the above-referenced proceeding (the "Notice"). In the Notice, the FCC initiates the 2010 periodic review of its media ownership rules. Given the incredible competition and diversity that characterize today's media marketplace, Fox continues to believe that the Commission no longer can justify regulating ownership of media outlets, including broadcast television stations and daily newspapers. Indeed, because the fast-changing marketplace has only gotten more diverse and competitive since the Commission concluded its 2006 quadrennial media ownership review, Fox is re-submitting for inclusion in the record here its comments and reply comments from the 2006 proceeding.

As Fox demonstrated in those filings, even the competitive landscape as it existed in 2006 failed to justify the Commission's effort to maintain structural media ownership regulations. Specifically, Fox explained that the media marketplace was replete with abundant competition, which had led to an amazing array of diverse options from which consumers can obtain news, information and entertainment programming.[1] During the last four years, competition has increased still further and new technologies have only intensified the struggle that traditional media outlets face in attracting viewers and readers. As the Commission recognizes in the Notice, "[d]ramatic changes in the marketplace make it highly appropriate that we take a fresh look at our current ownership rules in order to determine whether they will serve our public interest goals . . . ."[2] In light of the Commission's statutory charge – to "repeal or modify any regulation" that is no longer "necessary in the public interest as a result of competition"[3] – Fox submits that the time is long past due for the FCC to eliminate restrictions limiting ownership of media outlets.

In particular, with technology and innovation beating a steady drum of transformation across the media landscape, Fox believes (as further explained in its enclosed comments) that the archaic and counterproductive media ownership rules no longer have any utility. The robust marketplace of 2010 – especially the great equalizing force of the Internet – has rendered obsolete the structural regulations that have defined the Commission's oversight of media ownership for the past 50 years. Now, in a world with so much competition and so many voices contributing to the marketplace of ideas, there simply is no reason to perpetuate a regulatory regime that continues to treat owners of traditional media outlets as second-class citizens.

Should you have any questions concerning this submission, kindly contact the undersigned.

Respectfully submitted,

Antoinette Cook Bush
Jared S. Sher
Counsel to Fox

Enclosures

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1 *See, e.g.*, Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc., MB Docket No. 06-121 (filed Oct. 23, 2006), at 5-18.

2 *Notice*, at ¶ 1.

3 *Id.* (*citing* Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h) (1996)).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	))))))))	MB Docket No. 06-121

COMMENTS OF FOX ENTERTAINMENT GROUP, INC.
AND FOX TELEVISION HOLDINGS, INC.

Dated: October 23, 2006

SUMMARY

Fox Entertainment Group, Inc. and Fox Television Stations, Inc. (together, "Fox") submit their comments in response to the Commission's Further Notice of Proposed Rulemaking (the "*Notice*") initiating the comprehensive review of the broadcast media ownership rules called for by Section 202(h) of the 1996 Act. Section 202(h) requires the Commission to take stock of the modern media marketplace, and to acknowledge how dramatically technology and innovation are transforming the ways that consumers use media.

First and foremost, Fox submits that the Commission's focus of attention in this proceeding should be on the 2006 quadrennial review – not the Third Circuit remand decision stemming from the 2002 biennial review. Section 202(h) compels the Commission to reevaluate the ownership rules every four years, and to eliminate or modify any rule that can no longer be justified as necessary in the public interest as a result of competition. As even the Third Circuit has recognized, the FCC's analysis must take place in the context of the competitive realities of the world today, not the world of four years ago when the Commission last initiated review of the rules. The distinction is of enormous significance, given the spectacular technological changes that have transformed the media environment over just the last four years.

Today, more than 150 million Americans (three-quarters of the adult population) are Internet users, almost double the number from the year 2000. And those Americans are using the web not only to access an extraordinary array of media choices, but also to shape and control their own media experiences. Americans today are just as likely to be creators of content as they are to be consumers of others' programming, with blogs and podcasts leading to a proliferation of new content at an astonishing rate. The Internet has also become a great democratizing force. Never before has there existed a way for any person at any time to

spread his or her message to a mass audience. Yet with the Internet, today's consumer can communicate any idea without censor or editor. Wireless networks also have emerged as media competitors, offering a bevy of new video and web content on mobile devices. And as communications companies strive to expand their offerings in response to ever-increasing consumer demand for choice, the walls that once divided traditional communications companies are being torn down. As Chairman Martin recently made clear in remarks to the Senate Commerce Committee: "In this fast-paced technological environment, regulations struggle to keep up."

In light of these incredible competitive developments, Fox believes that it is beyond question that regulatory intervention is no longer necessary to ensure diversity and localism. Even in 2003, the Commission decided to retain the local TV ownership rule not to promote diversity and localism, but rather to protect competition in the market for the delivery of video programming. The Commission, however, analyzed competition only among local broadcast television stations, disregarding the extraordinary availability of video programming on the Internet and via other sources. Quite clearly, if the Commission, as required by Section 202(h), takes cognizance of the robust competition today, it will recognize that the video program market and audience preferences are more than adequately protected.

To the extent that the Commission has any residual concern about competition in the markets for television advertising or program production, a concern it expressed in 2003, it should defer to antitrust authorities who already are charged with ensuring competition in these purely economic markets, rather than the marketplace of ideas – the purview of the Commission. Indeed, as the Third Circuit recognized, the Commission in 2003 eschewed regulation of competition except as necessary to protect audience preferences – leaving to the antitrust authorities the responsibility for ensuring that merged companies do not raise prices above competitive levels.

Likewise, in 2003 the FCC adopted the cross-media limits not to regulate economic competition or promote localism, but to ensure diversity of viewpoints. The plethora of viewpoints available today, from as many diverse and antagonistic sources as there are people to posit views, is wholly sufficient to meet the Commission's goals without need for ownership regulations. And as the FCC made clear in 2003, cross-media combinations do not adversely affect economic competition in any relevant product market. Even if there were concerns about advertising competition, maintaining structural rules would be duplicative of antitrust oversight and, accordingly, not necessary in the public interest.

At the same time, maintaining outmoded regulation solely on the traditional media is likely to lead to fewer – not more – voices, while the traditional media face unprecedented threats from new and unregulated competitors. As the Internet has truly emerged as the great equalizer in the marketplace of ideas, the Commission's mandate under Section 202(h) has come into specific relief: a reevaluation of the public interest justification that may once have existed for structural ownership regulation reveals that the rules no longer can be deemed necessary in the public interest. In light of the veritable metamorphosis that the Internet, in particular, has wrought on the marketplace of ideas, Fox submits that the time has come to repeal the archaic and counterproductive broadcast media ownership rules once and for all and leave to antitrust authorities responsibility for promoting competition in economic markets.

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COMMENTS OF FOX ENTERTAINMENT GROUP, INC.
AND FOX TELEVISION HOLDINGS, INC.

Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. (together, "Fox") hereby respectfully submit their comments in response to the Commission's Further Notice of Proposed Rulemaking,[1] issued July 24, 2006, initiating the comprehensive review of the broadcast media ownership rules mandated by Section 202(h) of the Telecommunications Act of 1996.[2] Three years ago the Commission recognized that existing ownership regulations by and large fail to serve the public interest.[3] The FCC's attempt to retain modified versions of those rules, however, led to a remand from the U.S. Court of Appeals for the Third Circuit.[4] The Commission now seeks to address the court's criticisms in a statutorily required review of all of the broadcast ownership rules.

1 *See In re 2006 Quadrennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking, FCC 06-93, MB Docket No. 06-121 (rel. July 24, 2006) (the "*Notice*").

2 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), § 202(h) ("1996 Act").

3 *See In re 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report & Order, 18 FCC Rcd 13620 (2003) (the "*2002 Biennial Review Order*").

4 *See Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) ("*Prometheus*").

This proceeding also offers the Commission a fresh opportunity to recognize how dramatically technology and innovation have transformed the modern media marketplace. This recognition, Fox submits, will in turn inexorably lead the Commission to conclude that it should repeal the archaic and now counterproductive broadcast media ownership rules. The Commission should jettison rules that are entirely ill-suited to the realities of the modern world of ubiquitous and diverse media voices. As it recognized in 2003, the Commission should rely on enforcement of the antitrust laws to ensure that its competition policy goals are met, rather than on overly broad structural regulations adopted to serve other policy objectives. Moreover, in the current ever-expanding media universe, no regulatory intervention is necessary to advance the Commission's other bedrock goals – promoting diversity and localism. Indeed, continued regulation of the traditional media is likely to lead to fewer, not more, voices as these media face unprecedented threats to their audience and revenue from new unregulated competitors.

I. THE 1996 ACT OBLIGATES THE COMMISSION TO GIVE ALL OF THE MEDIA OWNERSHIP RULES A FRESH LOOK IN THE 2006 QUADRENNIAL REVIEW

A. The *Notice* Unduly Focuses on the Third Circuit's Remand Decision in *Prometheus* at the Expense of the Commission's Obligation to Conduct a Fresh Evaluation of the Media Ownership Rules Every Four Years

The *Notice* calls for comment on all of the media ownership rules (the local TV rule, the cross-ownership rules, the dual network rule, the local radio rule, and the UHF discount component of the national TV cap).[5] It does so in the context of examining and calling for comment on the Third Circuit Court of Appeals' remand decision in *Prometheus*.[6] Fox

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5 *See Notice*, at ¶¶ 1-10; *see also* 47 C.F.R. § 73.3555(a)-(d); 73.658(g). The national TV cap itself is not subject to review under Section 202(h).

6 *See Notice*, at ¶ 3.

respectfully submits, however, that the Commission should not narrowly focus on the court's disposition of the 2002 biennial review and its very much out-of-date record. Rather, the Commission should address the touchstone question that Section 202(h) of the 1996 Act requires the FCC to answer every four years: whether any of the rules remain "necessary in the public interest as the result of competition."[7]

As both the D.C. Circuit and the Third Circuit have recognized, the periodic review provisions of Section 202(h) are key components of a larger legislative scheme (the 1996 Act) that is designed to be deregulatory in nature. Under Section 202(h), the FCC is obligated to undertake a thorough reevaluation of its structural media ownership rules to determine if deregulation is warranted. The statute also compels the Commission to repeal or modify any rule that is no longer "necessary in the public interest."[8]

To the extent that the *Notice* primarily focuses on responding to the Third Circuit remand decision, the Commission's center of attention is misplaced. Section 202(h) commands the Commission to evaluate the rules in light of the competitive realities that exist in 2006 – a task wholly separate from the *Prometheus* remand, which by its very nature is confined to reexamination of the 2002 biennial review. While the remand decision may be instructive as the Commission moves forward in this proceeding, the Third Circuit's analysis should not be the focal point. Quite apart from answering the Third Circuit's specific

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7 *See* 1996 Act, § 202(h). *See Fox Television Station, Inc. v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002) (modified on rehearing at 293 F.3d 537 (D.C. Cir. 2002) ("*Fox*"); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*"); *Prometheus*, 373 F.3d at 384.

8 *See* 1996 Act, § 202(h); *see also Prometheus*, 373 F.3d at 384. It is of little moment that the courts have determined that the statutory phrase "necessary in the public interest" means only that the a rule be useful to or consistent with the public interest, *id*. at 393, or that both the D.C. Circuit and the Third Circuit have concluded in recent years that Section 202(h) does not carry a broad "deregulatory presumption." *See Cellco P'ship v. FCC*, 357 F.3d 88, 98 (D.C. Cir. 2004); *Prometheus*, 373 F.3d at 395. The essence of the law remains – the FCC must justify each media ownership rule and explain how it remains consonant with the goals of diversity, localism and competition.

questions about the rule changes proposed in 2003, the Commission must make a fresh attempt to determine whether the media ownership rules remain necessary in the public interest as the result of competition.

As even the Third Circuit acknowledged in *Prometheus*, decisions made as part of one periodic review pursuant to Section 202(h) are not binding as to subsequent reviews – even when the subsequent review takes place in the context of a court remand.[9] For instance, although the *2002 Biennial Review Order* had to be consistent with the remand directives of the D.C. Circuit Court of Appeals (in the *Fox* and *Sinclair* appeals), the Third Circuit explained that those appeals were not binding on the 2002 biennial review because the latter constituted an entirely new proceeding: "This case involves petitions for review of the Commission's comprehensive reexamination of a larger set of its broadcast ownership rules, in which a different set of parties participated, a different record was compiled, and a different result reached."[10]

For the same reasons, the *Prometheus* decision does not compel the Commission to tether the 2006 quadrennial review to the Third Circuit remand. Indeed, doing so would constitute an abrogation of the Commission's mandate under Section 202(h). Instead, the Commission should use the opportunity presented by this quadrennial review to take an entirely fresh look at the media landscape, and the ways that new technologies have rendered the media ownership rules entirely irrelevant in the modern world.

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9 *See Prometheus*, 373 F.3d at 414.

10 *Id.*

B. Revolutionary Developments in Technology in Just the Last Four Years Underpin the Dynamism and Vitality that Characterize the Current Media Landscape

During the 2002 biennial review, the Commission acknowledged the myriad ways in which the media marketplace had evolved since the adoption of the various media ownership rules:

> Americans today have more media choices, more sources of news and information, and more varied entertainment programming available to them than ever before. A generation ago, only science fiction writers dreamed of satellite-delivered television, cable was little more than a means of delivering broadcast signals to remote locations, and the seeds of the Internet were just being planted in a Department of Defense project. Today, hundreds of channels of video programming are available in every market in the country and, via the Internet, Americans can access virtually any information, anywhere, on any topic . . . . Nonetheless, while the march of technology has brought to our homes, schools, and places of employment unprecedented access to information and programming, our broadcast ownership rules, like a distant echo from the past, continue to restrict who may hold radio and television licenses as if broadcasters were America's information gatekeepers.[11]

As demonstrated in the joint *Network Comments* filed as part of the 2002 biennial review, it is beyond dispute that today's robust media landscape – and the technologies which consumers use to interact with media – bears no resemblance to the static media marketplace of generations past.[12] Yet as much as the media world had changed in the years leading up to the 2002 biennial review, the last four years have witnessed an even greater sea change in the media universe. As Chairman Martin emphasized in recent remarks before the Senate Commerce Committee: "the communications industry is in a time of unprecedented

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[11] *2002 Biennial Review Order*, 18 FCC Rcd at 13623.

[12] *See* Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc., National Broadcasting Company and Telemundo Communications Group, Inc., and Viacom, MB Docket No. 02-277, submitted January 2, 2003, at 10-23 (the "*Network Comments*").

change. . . . Television programs are sold on the Internet and streamed wirelessly to mobile devices, teenagers communicate over IM, SMS and MySpace, not the landline phone; DVRs mean you watch your TV when and where you want; mobile phones show movies, play songs, photograph your kids, and even send you emergency messages. In this fast-paced technological environment, regulations struggle to keep up."[13]

Consumers today not only have access to an extraordinary array of media choices, they also have an unprecedented degree of control over their own media experiences. In fact, it is not hyperbole to suggest that new advances in technology and innovation are occurring so rapidly that further groundbreaking changes are likely to occur even as the Commission considers the comments filed in this proceeding. As Chairman Martin made abundantly clear, government regulation cannot possibly hope to keep pace with the velocity and scope of marketplace changes. The developments summarized below appear spectacular when viewed against the state of technology of just a few years ago; it is inevitable, however, that this summary will become superannuated by the developments certain to occur over the *next* few years.

The Internet

As of 2006, nearly 150 million Americans (or about 75 percent of the country's adult population) were Internet users – about 50 percent higher than the number from the year 2000.[14] Nearly 90 percent of U.S. teenagers are web users.[15] And three-quarters of active

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[13] Written Statement of The Honorable Kevin J. Martin, Chairman, Federal Communications Commission, Before the Committee on Commerce, Science & Transportation, U.S. Senate, September 12, 2006.

[14] *See How the Internet is Changing Consumer Behavior and Expectations*, Lee Rainie, Director, Pew Internet & American Life Project, May 9, 2006, at 5.

[15] *See Generations Online*, Data Memo, Pew Internet & American Life Project, December 2005, at 1.

home web users in the United States access the Internet with a broadband connection.[16] Broadband connections are now ubiquitously available, with cable modem and/or DSL offered in all 50 states and in 99 percent of the nation's zip codes, according to the latest FCC usage report.[17] The number of high-speed lines has more than doubled just since December 2002.[18] And the promise of WiMAX looms with predictions of even more robust broadband access, both fixed and mobile, including in rural areas.[19]

Increased Internet penetration, and broadband penetration in particular, has led to an absolute transformation of the way people use the web.[20] Broadband connections enable users to view and send enormous amounts of information, including large video files, with ease. Internet users now regularly create their own multimedia content. From blogs to podcasting to online videos, everyday citizens are leading the charge in the exponential growth in content accessible on the web. In 2002, Pew found that only "broadband elite"

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16 *See U.S. Broadband Composition Reaches 72 Percent at Home*, Nielsen//NetRatings, July 21, 2006, at 1.

17 *See High-Speed Services for Internet Access: Status as of December 31, 2005*, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, July 2006, at 4. DSL connections are available in nearly 80 percent of households for which local exchange carriers provide phone service; cable modem connections are available in more than 90 percent of households for which cable companies provide video cable service. *See id.* at 3-4.

18 *See id.* at Table 1.

19 "WiMAX, which should be capable of 50 megabits to 100 megabits per second, is 'significantly better than what we typically look at with DSL and cable,' [Intel CEO Craig] Barrett said. 'I think that will be very competitive with those technologies, and especially where those technologies aren't built out, in rural areas.'" *See Intel's CEO Says WiMAX Competitive With DSL, Cable*, eWeek.com, March 6, 2005.

20 Broadband use continues to grow rapidly. Between March 2005 and March 2006, broadband adoption in U.S. homes increased by 40 percent, twice the growth rate from the year before. *See Home Broadband Adoption 2006*, Pew Internet & American Life Project, May 28, 2006, at i.

technophiles posted user-generated content to the web; today nearly 50 million Americans do so (nearly half of whom are under age 30).[21]

Technology also has enabled the creation of a number of social networking sites that are quickly becoming the 21st century's gathering place of choice – especially for younger Americans. By the summer of 2006, user-generated content was driving half of the country's top 10 fastest growing web brands.[22] Sites like MySpace.com, owned by Fox's parent company News Corporation, and YouTube.com have experienced phenomenal growth. MySpace.com, for example, grew from 16 million unique monthly visitors in 2005 to more than 46 million in 2006; YouTube has grown to nearly 20 million unique monthly users, and it has only existed for about 8 months.[23] On these sites consumers use the Internet to share videos, photos and blogs – making their personal experiences and commentary available for all to see. Consumers also flock to these sites to meet and interact with new friends, share experiences, seek out support from others, and find content that often is not available anywhere else – and in almost every case, all of these offerings are free of costs and intrusive editing by the sites' owners. Social networking sites are exploring ways to enhance how content creators share their works with mass audiences. For example, MySpace.com recently announced a partnership with Snocap, a file sharing service, to permit musicians and record labels to sell their music directly to consumers through MySpace.com profile pages.[24]

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21 *See id.* at ii-iii.

22 *See User-Generated Content Drives Half of U.S. Top 10 Fastest Growing Web Brands*, Nielsen//NetRatings, August 10, 2006, at 1.

23 *See id.; see also YouTube U.S. Web Traffic Grows 75 Percent Week Over Week*, Nielsen//NetRatings, July 21, 2006, at 1.

24 *See Peer-to-peer startups jolted by MySpace deal*, Daily Deal, September 6, 2006.

Beyond simply attracting millions of visitors each month, social networking sites are having a real and lasting impact on American democracy. Many attribute the grass roots power of Internet communication with playing a vital role in Ned Lamont's upset victory over long-term incumbent Sen. Joe Lieberman in the 2006 Connecticut Democratic Senate primary.[25] The New York Times explained recently that social networking web sites are proud of the effect they are having on elections: "[YouTube] has been quick to take credit for radically altering the political ecosystem by opening up elections, allowing lesser known candidates to have a platform."[26] The Internet also enables the formation of new content networks. In South Korea, for example, which is saturated with broadband Internet connections, an online publisher has put together a team of tens of thousands of citizens to gather and compile content in perhaps the world's most successful citizen content network.[27] With more than 1 million daily visitors, the online network already is the sixth-most influential media outlet in South Korea, topping one of the three national broadcast TV networks.[28] The Korean experience is a precursor to similar endeavors in the United States, where sites such Bayosphere are already competing for audiences by offering hyper-local multimedia content.[29] The trend will certainly accelerate as users continue to adopt broadband in this country.

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25 *See Lamont Relied on Net Roots – And Grass Roots*, The Washington Post, August 9, 2006; *see also Netroots Activists Claim Victory in Lieberman Defeat*, Capitol Hill Blue, August 10, 2006.

26 *See The YouTube Election,* The New York Times, August 20, 2006.

27 *See The Power of Us; Mass Collaboration on the Internet Is Shaking Up Business*, Business Week, June 20, 2005.

28 *See id.*

29 *See id.*

As the director of the Pew Internet & American Life project put it: "[W]e're surrounded by media and communications tools and the bit-flow around us is as available as the air we breathe."[30] And these tools, once available only within reach of a wire, are now available via devices Americans carry in their pockets wherever they go. Nearly 75 percent of U.S. adults, and almost half of all U.S. teens, own a wireless phone – many of which can access Internet content and exchange information in addition to providing voice telephony.[31]

And the Internet is a source of constantly updated information – 24 hours a day/7 days a week. Internet users have become accustomed to instant access to current information that most traditional broadcast media cannot emulate. Thanks to the Internet, people often arrive home from school or work already having learned the developments of the day and don't need to tune in to the local TV station's evening news. Because of the proliferation of new technologies, consumers are increasingly multitasking in their use of media: 70 percent of web users watch television while surfing the Internet.[32]

In the Internet age, the line between producers and consumers of content has been blurred. Today, a person is just as capable of producing content as consuming it – and instead of information flowing one-to-many, it surges freely between consumers who decide for themselves what is relevant and what to discard. Blogging and podcasting, in particular, represent two phenomena that have flipped traditional electronic media usage on its head. Whereas at one time consumers sat passively and waited to absorb information from a central hub (first radio and then TV broadcasters), today consumers have taken control of the

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[30] *See How the Internet is Changing Consumer Behavior and Expectations*, Lee Rainie, Director, Pew Internet & American Life Project, May 9, 2006, at 1.

[31] *See id.* at 3.

[32] *See Mass Media Notes*, Communications Daily, August 11, 2006.

information exchange and made it not just a two-way street, but a multilane super highway. The flow of information uses a multitude of technologies, and the flow of discussion runs in as many directions as there are people interested in participating.

FiOS, IPTV and Wireless

Technology also is obliterating barriers between media providers. Not long ago, a telephone company such as Verizon provided only phone service while a cable company such as Comcast delivered just video channels. Now, both compete aggressively with one another and with other emerging competitors for video, voice and Internet consumers. Verizon, for instance, has launched a wide-scale plan (dubbed FiOS) to deliver ultra-fast broadband and video service to consumers using fiber lines.[33] AT&T has launched its own new video service using an Internet-based video platform (IPTV).[34] And Time Warner, Cablevision and other cable companies are capitalizing on advances in technology to use the Internet to offer their video customers telephony service.[35]

Wireless players are trying equally hard to enter new markets. Sprint plans to invest $3 billion to create a wireless high speed data network (using WiMax) to offer consumers broadband without need of a cable or DSL wire.[36] Qualcomm, meanwhile, proposes to offer a television service over wireless phones – called MediaFLO, "it is expected to include 20

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[33] According to Ivan Seidenberg, Verizon's CEO, "FiOS will change the competitive landscape in the video marketplace, both now and in the future. From Day One, we'll offer a new technology, a new business model and a new customer experience." *See Verizon FiOS TV Will Offer a New Customer Experience, Seidenberg Says; Calls on Broadcasters to Support Verizon's Franchise Reform*, PR Newswire, April 18, 2005.

[34] AT&T has said that it will offer significant discounts to customers who purchase bundled services. *See AT&T Challenges Its Cable Rivals With Bundle Discounts*, Financial Times, March 30, 2006.

[35] *See, e.g., Cable Cos May Bid on Wireless Spectrum,* Associated Press Financial Wire, May 10, 2006.

[36] *See Two Technology Giants Clash In Battle for Wireless Internet*, The Wall Street Journal, August 24, 2006.

channels of near-TV quality programs . . . and the cell phone equivalent of a Tivo . . . ."[37] And MobiTV already has 500,000 subscribers who pay about $10 a month to watch 20 channels of clips and programs on wireless phones.[38] This new generation of wireless "networks intend to make the picture better, deploying the same broadcast towers and discarded analog spectrums used by the broadcasters. The result: a TV-like experience, with sharper pictures and live video, all on a two-inch screen."[39]

Equally significant, new technologies are themselves merging with traditional hardware. Consumers in the near future will not just be able to *obtain* video on the Internet and other new devices, they'll also be able to *view* that content on the same television set that they currently use for broadcast, cable or satellite content. Apple, for example, which revolutionized the music industry with the iPod and iTunes, recently announced plans to sell movies over the Internet, which in turn can be viewed on a television set using a wireless home network.[40]

In contrast, the regulated media since 2002 have suffered significant audience erosion, particularly among younger consumers. For example, the share of viewers aged 12-

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[37] *See A Big Push for the Small Screen*, Business Week, April 3, 2006.

[38] *See id.*

[39] *See id.*

[40] *See Apple Computer Aims to Take Over Your Living Room*, The Wall Street Journal, September 13, 2006. Technology has been just as revolutionary when it comes to audio content. More than 20 million Americans today have an iPod or other MP3 player, and podcasting, which permits any citizen to begin his or her own audio programming service, currently captures the attention of more than 9 million adults. *See Podcasting*, Data Memo, Pew Internet & American Life Project, April 2005, at 1; *see also Podcasting Gains an Important Foothold Among U.S. Adult Online Population*, Nielsen//NetRatings, July 12, 2006, at 1. And these podcasting statistics, like those related to many new media, likely under-count the actual number of users, since many surveys ask questions of adults. Given that teenagers rapidly adopt new technologies (especially those with little to no cost), the actual usage rates today are likely higher than shown by statistical surveys, and the usage rates probably will skyrocket over time as the rest of the country catches up with early adopters.

24 that watch broadcast television today has dropped by more than 20 percent compared to 10 years ago.[41] The drop-off in the last 10 years is even more striking – more than 30 percent – among teenagers aged 12-17.[42] Additionally, according to Arbitron data, the amount of time people tune in to radio over the course of a week has fallen by 14 percent in the last decade.[43] And while all age groups are listening to the radio less, 12-to-34-year-olds have tuned out the most.[44]

The ubiquity of broadband access is hastening consumers' abandonment of "old" media and forcing traditional media companies to take drastic steps in an effort to adapt to the modern world. Boston, for example, has the third-highest broadband penetration rate of any U.S. city, with 75 percent of the city's households receiving high-speed Internet.[45] According to The Wall Street Journal, it is no coincidence that the city's mainstay daily newspaper – *The Boston Globe* – is now suffering from dramatic declines in circulation and advertising: "It's the Internet. It's all the choices people have for their time."[46] Similar challenges have prompted NBC Universal to announce plans to reduce broadcast news and entertainment operating expenses by $750 million (largely by eliminating 5 percent of its global workforce) so that spending can be redirected toward digital media.[47]

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41 *See* Nielsen Media Research Television Index for broadcast years 1996/97-2005/06.

42 *See id.*

43 *See Changing Its Tune*, The New York Times, September 15, 2006.

44 *See id.*

45 *See Boston Globe Doesn't Deliver For The Times*, The Wall Street Journal, October 19, 2006.

46 *Id.*

47 *See NBC Universal To Slash Costs In News, Prime-Time Programs*, The Wall Street Journal, October 19, 2006.

Technology and Democracy

Opponents of relaxing the media ownership rules continue to advance the spurious claim that deregulation is some sort of "threat" to democracy.[48] Their argument is unsupportable, because it wholly ignores the power of the Internet – without doubt the most democratizing technology in the history of human invention.

Whether it is a candidate canvassing voters through web sites and email campaigns, political activists or news commentators speaking out with blogs, or a public interest group seeking to mobilize supporters for any chosen cause, the Internet permits individuals to communicate directly with others. Incumbent politicians and challengers alike can share with voters views on every issue imaginable, without being forced to speak in "sound bites" or to otherwise conform to the limits imposed by a traditional news hole.[49] Sen. Kennedy, for example, recently posted a speech about the hot-button public policy issue of network neutrality directly on YouTube.com.[50] Speaking to Internet users, Sen. Kennedy noted that the Internet "allows me and everyone else to communicate directly to you, no matter what your political agenda, no matter what your political party."[51]

The wealth of video content available on the Internet represents a new and growing source of competition for audience attention with broadcast stations, especially with respect to local news and information. Most significantly, Internet content can be far more narrowly

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48 *See, e.g., Can Democracy Be Saved from the Threat of Media Consolidation?*, available at http://www.hearusnow.org/mediaownership/27/ (a project of Consumers Union) (last visited October 23, 2006); *see also* http://www.stopbigmedia.com (last visited October 23, 2006).

49 *See Politicians Try Out MySpace*, The Wall Street Journal, October 14, 2006 (noting that sites likes MySpace.com are not just used for "communicating with voters" but also as a means of "attracting volunteers and their donations").

50 *See Senator Kennedy Stars on YouTube*, Broadcasting & Cable TV Fax, September 21, 2006.

51 *Id.*

focused on a community's local issues or elections than a broadcast station providing service to an entire metropolitan area. Thus, sites such as YouTube.com are full of video footage of candidate forums and debates – and not just for congressional and gubernatorial elections, but also for city council and school board races.[52] The site also makes available coverage of political protests, whether related to national policies (including the Iraq war or immigration) or local issues (such as a particular candidate's exclusion from a televised debate).[53] Some content even features debates between lesser-known candidates who have not been invited to participate in sessions with major-party contenders.[54] Separate from YouTube.com, dozens, if not hundreds, of municipalities provide free Internet video coverage of town or city council meetings (in markets ranging from Los Angeles and Boston to Bellingham, Wash. and Holly Springs, N.C. (population 9,175)).[55] And the vast majority of all of this web content consists of footage that has not been broadcast on a local television station.

Politics aside, the Internet enables those who share common ideals to marshal their resources to advance any cause, while others can pursue dialogue and debate in an effort to sway converts to their side. Ideas do not have to be popular or widely-held to be distributed in the modern media marketplace. Ideas that may at first be shared by only a few can gain

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52 *See, e.g.*, http://www.youtube.com/watch?v=DdLyYElISVU (last visited on October 23, 2006); http://www.youtube.com/watch?v=zAuqeAlmejI (last visited October 23, 2006).

53 *See, e.g.*, http://www.youtube.com/results?search_query=iraq+war+protest&search=Search (last visited October 23, 2006); http://www.youtube.com/watch?v=yv0ipA1z8yU (last visited October 23, 2006).

54 *See, e.g.*, http://www.youtube.com/watch?v=WMPxuDWw964 (last visited October 23, 2006).

55 *See, e.g.*, http://www.cityofboston.gov/citycouncil/cc_video_library.asp (last visited October 23, 2006); http://www.hollyspringsnc.us/media/list.htm (last visited October 23, 2006).

currency and spark a movement of thousands or even millions of citizens – regardless of whether the traditional media find the idea newsworthy.[56]

It is particularly ironic for opponents of media ownership deregulation to argue to the Commission that traditional media "control" what people see and hear, and thus what they think.[57] As the opponents of deregulation are always quick to point out, the 2002 media ownership biennial review proceeding generated several million comments from everyday consumers, and this despite what those same opponents of deregulation have called a dearth of traditional press coverage about these issues. That millions of everyday citizens may have submitted form emails opposing relaxation of the media ownership rules does not necessarily mean that they are right – only that, thanks to the Internet, they had the chance to participate in the dialogue about national policy largely without relying upon traditional media. It is self-evident that millions of citizens could not have participated in this way if the traditional media "controlled" all of the information available to those citizens.

Moreover, studies demonstrate that the Internet has become a "key force" in the democratic process. For the 2004 election cycle, 75 million Americans used the Internet to get political news and information, discuss candidates and debate issues or volunteer to assist

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56 For instance, the Internet played a crucial role in breaking the recent news story about Congressman Mark Foley. *See Fox News vs. The World*, The Washington Post, October 2, 2006. ABC broke the story of the Congressman sending inappropriate emails to congressional pages on its web site, but the story gained traction only after other pages, upon seeing the Internet report, used an Internet blog to provide ABC with additional communications from Congressman Foley. *See id.* The Internet also was the impetus for the downfall of the majority leader of the United States Senate, when writers disseminated the story surrounding Senator Trent Lott's controversial remarks at Strom Thurmond's 100th birthday party. While most of the mainstream press failed to pick up on the story initially, "[W]eb writers were leading the charge" in a way that "helped force the story into public view." *See A Hundred-Candle Story and How to Blow It*, The Washington Post, December 16, 2002.

57 *See, e.g. Why Media Matters*, Office of Communication of United Church of Christ, available at http://www.ucc.org/ocinc/wmm/ (last visited October 23, 2006).

in a campaign.[58] The number of registered voters who cited the Internet as one of their primary sources of news about the presidential campaign increased by 50 percent between 2000 and 2004.[59] And while mainstream media web sites continued to be extremely popular, fully a quarter of Americans reported getting information from non-traditional web sites.[60] Equally significant, the Internet is contributing to a wider awareness of political views, as web users – rather than insulating themselves by seeking only content about which they agree – are intentionally visiting web sites that challenge their natural points of view.[61]

Never before in history has there existed a way for any individual at any time to spread his or her message to a mass audience. As the Internet has truly become the great equalizer in the marketplace of ideas, the vitality of public communication has only strengthened – and far from being threatened, American democracy is more robust than ever before.

The Commission's obligation under Section 202(h) is clear – the rules must be reevaluated to determine whether the public interest rationale present at the rules' inception retains validity today in light of these tectonic shifts. Fox submits that the simple answer is: No. The realities of the marketplace of ideas long ago eliminated any justification that may once have existed for structural ownership rules.[62] In fact, as demonstrated herein and in

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58 *See The Internet and Campaign 2004*, Pew Internet & American Life Project, March 6, 2005, at i.

59 *See id.*

60 *See id.* at 5.

61 *See id.* at 9.

62 Although these comments focus on the local TV ownership rule (47 C.F.R. 73.3555(b)) and the cross-ownership rules (47 C.F.R. § 73.3555(c) and (d)), Fox believes that the same marketplace realities warrant repeal of the other media ownership rules as well (the dual network rule and the local radio ownership rule, 47 C.F.R. §§ 73.658(g) and 73.3555(a)).

comments in prior biennial review proceedings, the structural ownership rules are in many ways operating to contradict and undermine the Commission's stated public interest objectives.[63]

II. THE TRANSFORMING MEDIA MARKETPLACE RENDERS THE LOCAL TV OWNERSHIP RULE IRRELEVANT AND COUNTERPRODUCTIVE TO THE GOALS OF PROMOTING DIVERSITY AND LOCALISM

Even based on the record as it existed in 2003, the FCC determined that the current local TV ownership rule was "not necessary in the public interest to promote competition."[64] In addition, the Commission correctly acknowledged that, because the current rule is falsely premised on the notion that only local TV stations contribute to viewpoint diversity in local markets, the rule does not actually promote viewpoint diversity.[65] The FCC also noted that the current rule may well hinder the goal of promoting localism.[66]

The Third Circuit in *Prometheus* suggested that there was only weak evidence that non-broadcast sources contributed to viewpoint diversity in local TV markets.[67] Fox respectfully submits that – even if the court were correct based on the 2003 state of the record – the plethora of alternative local content available today surely reinforces the Commission's conclusions in the *2002 Biennial Review Order* that consolidation among local TV outlets poses no threat whatsoever to viewpoint diversity. In particular, the court barely mentioned the Internet, noting merely that the web was "limited in its availability and

63 *See, e.g., Network Comments*, at 33-58.

64 *2002 Biennial Review Order*, 18 FCC Rcd at 13668.

65 *See id.*

66 *See id.*

67 *See Prometheus*, 373 F.3d at 415.

as a source of local news."[68] Regardless of whether those conclusions may have been accurate in 2003, they are absolutely inconsistent with today's marketplace realities.

In short, as demonstrated above, it is more obvious now than it was four years ago that local TV stations hold no monopoly on contributing to the marketplace of ideas. From broadcast and satellite radio to hundreds of cable channels to the virtually limitless font of information available via the Internet, consumers for several years now have had a multitude of choices for information and content in addition to local television.

A. The Rule, Based on Protecting Competition, Ignores the Competitive Impact of Video Programming from Sources Other than Broadcast Television – Especially the Internet

While finding the existing local TV ownership rule unnecessary to protect competition in the market for the delivery of video programming, the Commission in 2003 adopted relaxed numeric limits, asserting that there was a need to ensure the existence of six equal-sized video programming providers in each market.[69] Given that the Commission agreed even in 2003 that the local TV ownership rule is not necessary to protect diversity or localism, a rule restricting local TV ownership based solely on competitive concerns cannot possibly be deemed necessary in the public interest.

The antitrust laws already exist to ensure adequate competition, including in the market for the delivery of video programming, which the FCC identified as at-risk in the *2002 Biennial Review Order*.[70] Fox continues to believe that the antitrust laws, which

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[68] *Id.*

[69] *2002 Biennial Review Order*, 18 FCC Rcd at 13693.

[70] *See id.* at 13773.

regulate economic markets, are sufficient to ensure that no merger eliminates from a local market a healthy number of rivals competing for audiences.

Nonetheless, the Third Circuit in *Prometheus* ruled that the local TV rule was not duplicative of antitrust review, accepting the FCC's argument that its competition analysis focuses on audience preferences.[71] In contrast, the court explained, the antitrust authorities ensure that merging companies do not raise prices above competitive levels.[72]

Even if the Commission's professed concern with audience preferences is sufficient to defeat the argument that its regulations are duplicative and therefore contrary to the public interest, there still would be no reason for retention of the local TV Ownership rule. To the contrary, as explained below, if the Commission's examination of audience preferences is properly implemented – taking into account all media that compete for audience – it would be abundantly clear that competition in the market for delivered video programming is robust. Thus, deferring government oversight to the antitrust authorities would be more than adequate to ensure that the Commission's policy goals are realized.

In the *2002 Biennial Review Order*, the FCC modified the local TV rule in an effort to preserve a healthy level of competition among rival video programmers.[73] As the Commission explained: "The public is best served when numerous rivals compete for viewing audiences. In the [market for the delivery of video programming], rivals profit by

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71 *See Prometheus*, 373 F.3d at 414. In the *2002 Biennial Review Order*, the FCC said that while the antitrust authorities are concerned with ensuring economic efficiency through competitive market structures, the Commission's "public interest inquiry has a different focus." 18 FCC Rcd at 13641.

72 *See Prometheus*, 373 F.3d at 414. The court also noted that antitrust regulators "typically review only larger mergers." *Id.* Of course, just because the Justice Department "typically" reviews only large mergers does not preclude antitrust review of smaller transactions in the event that there is governmental concern about a particular transaction's overall impact on competitive conditions.

73 *2002 Biennial Review Order*, 18 FCC Rcd at 13692.

attracting new audiences and by attracting existing audiences away from competitors' programs."[74] The FCC said that cable networks, because they make programming decisions on a nationwide basis, did not have adequate incentives to respond to potential concentration concerns arising from a merger of two broadcast TV stations.[75] Even if accurate, that predicate does not make true the FCC's ultimate conclusion – that only local broadcast TV stations respond to conditions in local markets. In fact, given the Internet, TV stations are only a few of the many outlets constantly adapting to the realities of modern technology in local markets.

The FCC argued in 2003 that the "additional incentives facing competitive rivals are more likely to improve program quality and create the programming preferred by existing viewers."[76] While true on its face, the Commission's attempt to limit this conclusion to competition among only local TV stations flies in the face of marketplace realities, for it ignores the power of the Internet and the multitude of web sites working hard to siphon audiences away from television by creating high quality, and highly local, programming. The Internet, which the Commission hardly mentioned in the local TV rule portion of the *2002 Biennial Review Order*, constitutes a significant competitive factor in local markets.[77]

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[74] *Id.*

[75] *See id.* at 13693.

[76] *Id.* at 13692.

[77] *See, e.g.*, *supra*, at 14-15. The FCC's 2003 conclusion also ignores the ways that cable is now competing for viewers on a local basis. Comcast, for instance, offers a wide range of local election content to consumers via its video-on-demand service. This free content includes debates and candidate interviews for hundreds of local and state-wide races – all targeted to viewers based on the elections most relevant to their local areas. *See Comcast, CN8 Host Politics On-Demand*, Sky Report, October 20, 2006.

B. Given the Intense Rivalry for Audiences that Characterizes Modern Media Markets, the Commission Should Recognize that the Local TV Rule Is No Longer Necessary to Protect Competition

In attempting to rewrite the local TV ownership rule in 2003, the FCC adopted a modified approach to measuring competitive harms based on the Justice Department's Merger Guidelines.[78] The Commission, however, determined that because all TV stations have equal capacity to contribute to the market for the delivery of video programming, it was appropriate to presume equal shares for every station regardless of their actual market share at any given time.[79] If the FCC persists today in pursuing a local TV ownership rule that relies upon numeric cut-offs, Fox agrees that identifying all participants in the marketplace of ideas as equally capable of competing for audiences is a laudable goal – but the *2002 Biennial Review Order* fell short of the mark.

Fox strongly believes that a particular outlet's popularity should have no bearing on its regulatory status in the marketplace of ideas. Since every outlet has the capacity to transmit information that consumers may value, and since consumers today have ready access to all manner of different outlets (as well as the ability to switch interchangeably between outlets, or to use different outlets simultaneously), the Commission correctly decided not to measure TV stations based on their popularity.[80]

Yet in 2003, the Commission inexplicably excluded every other type of media from its analysis[81] – even though outlets on radio, cable and the Internet, to name but a few,

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78 *See 2002 Biennial Review Order*, 18 FCC Rcd at 13693.

79 *See id.* at 13694

80 *See also Statement on Media Ownership Rules*, submitted by Dr. Bruce Owen as part of the *Network Comments*, January 2, 2003 (the "*Owen Statement*"). Fox requests that the *Network Comments*, including the *Owen Statement*, be incorporated by reference into the record of this proceeding.

81 *See 2002 Biennial Review Order*, 18 FCC Rcd at 13693-94.

compete just as vigorously as TV stations when it comes to trying to attract audiences. Cable networks and video content on the Internet, in particular, are significant competitors to local TV stations in the market for the delivery of video programming. As described above, their efforts to create quality programming to draw viewers away from broadcast television are clearly having a competitive impact that the Commission no longer can ignore. As video content proliferates on mobile devices, such as handheld computers and wireless phones, the competitive landscape will further undermine the TV-centric assumptions upon which the FCC historically has relied.

The Commission's attempt to evaluate only local TV stations as competitors in the market also raises troubling First Amendment questions. It is entirely inappropriate for the government to maintain ownership limitations over certain types of speakers – TV station owners – simply because their content is more attractive to wide audiences. Although the FCC correctly determined not to measure TV stations based on their relative popularity among broadcast outlets, the *2002 Biennial Review Order* nonetheless treats TV station owners differently than owners of other video competitors.[82] That approach is antithetical to the First Amendment, which commands that government should not preclude one speaker from acquiring additional outlets on the basis of the popularity of the speaker's content.[83]

Even if the Commission's approach were constitutionally permissible, it is nonetheless counter-productive. As more and more viewers, especially younger audiences, abandon traditional media for alternatives, it makes less and less sense for the Commission to

[82] *See id.*

[83] *Cf. Boy Scouts of America v. Dale*, 530 U.S. 640, 660 (2000) (*citing Texas v. Johnson*, 491 U.S. 397 (1989); Brandenburg v. Ohio, 395 U.S. 444 (1969)) ("The First Amendment protects expression, be it of the popular variety or not. And the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.").

continue to hamstring only broadcasters with legacy structural regulations. If broadcasters alone remain subjected to the heavy hand of government restrictions, leaving unregulated media to thrive free from oversight, the audience trends will only worsen. Ironically, in the name of protecting local broadcasting, retention of the local TV ownership rule is more likely to hasten its demise than promote competition.

Counting every outlet as uniformly capable of contributing to the market for the delivery of video programming, and as equally dynamic in the rivalry for viewers, would permit the Commission easily to eliminate local TV ownership restrictions. As the FCC itself expressed in 2003: "What is critical to our competition policy goals . . . is the assurance of a sufficient number of strong rivals actively engaged in competition for viewing audiences. As long as there are numerous rival firms in the [market for delivery of video programming], viewers' interests will be advanced."[84] Clearly, in the vast majority of markets – and certainly in the nation's largest markets – there is such a plethora of challengers competing to attract consumers with localized content via TV or otherwise that structural ownership regulations are in no way necessary to serve the public interest.

The FCC noted in 2003 that retaining a local TV ownership rule also may have the effect of protecting competition in the markets for advertising and program production.[85] But as set forth above, the Commission in the *2002 Biennial Review Order* distinguished its role from that of the Justice Department on the basis that the FCC's regulations focus on audience preferences.[86] The Third Circuit relied upon this distinction in rejecting the argument that

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[84] *Id.* at 13672.

[85] *See id.* at 13691.

[86] *See id.* at 13641.

the local TV ownership rule is duplicative of antitrust review.[87] If the local TV ownership rule were eliminated, Fox believes that there is more than sufficient competition to avoid any adverse affect on the advertising and program production markets. To the degree that any threats to those markets arise, however, the antitrust authorities should be relied upon to handle them.

Accordingly, in evaluating the local TV rule from the fresh perspective of today, the FCC should acknowledge that since all electronic media available to a consumer are capable of contributing to the marketplace for video programming, the rule should be eliminated.[88]

III. CROSS-OWNERSHIP RULES ARE UNNECESSARY IN A WORLD WHERE TECHNOLOGICAL CHANGE HAS BLURRED THE LINES BETWEEN DIFFERENT TYPES OF MEDIA

A. The Commission, Affirmed in This Instance by the *Prometheus* Court, Has Recognized that the Existing Rules Fail to Serve Their Intended Purpose

In the *2002 Biennial Review Order*, the Commission correctly concluded that neither the newspaper/broadcast cross-ownership rule nor the radio/TV cross-ownership rule were necessary in the public interest as the result of competition.[89] As to economic competition, the Commission concluded that the ever-more competitive media marketplace of today only

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87 *See Prometheus*, 373 F.3d at 414.

88 Likewise, application of the antitrust laws abrogates the need for Commission regulation of local radio station mergers and network mergers. With respect to the local radio ownership rule, the Commission also said that "preserving competition for listeners" of audio programming, rather than advertising or production markets, "is our paramount concern." *2002 Biennial Review Order*, 18 FCC Rcd at 13716. Given the technological developments described herein, competition in the market for audio programming (from iPods and the Internet to satellite radio to content on other mobile devices) is sufficiently robust to eliminate any need for a structural ownership rule. Any residual concern about competition in the markets for radio advertising or program production can be handled by antitrust authorities, as the Commission acknowledged before the Third Circuit. Similarly, in retaining the dual network rule, the FCC was particularly concerned with competition in the national advertising and program production markets, but these concerns can be fully addressed within the context of antitrust review.

89 *2002 Biennial Review Order*, 18 FCC Rcd at 13747.

reinforces those decisions, and that cross-media combinations do not adversely affect economic competition in any relevant product market.[90] The Third Circuit in *Prometheus* agreed that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer necessary in the public interest," since common ownership can promote localism without dampening viewpoint diversity.[91] Nonetheless, the Commission retained cross-ownership rules to protect so-called "at-risk" markets.[92]

Fox continues to believe, as it did in 2003, that proper application of the antitrust laws will ensure adequate levels of competition in markets of all sizes. Given that common ownership of different types of media in a single market can enhance localism, without any harm to diversity, there should not be cross-ownership limits in any market. As consumers and media alike continue to blur the lines between different types of media, technology-specific rules are revealed as arcane and anachronistic.

B. Line-Drawing on the Basis of Media Popularity Is an Unnecessary – and Constitutionally Inappropriate – Task

Even if the FCC were to retain cross-ownership limits it is abundantly clear that there is no justification for applying the rule in larger markets. The Commission and the Third Circuit reached a similar conclusion in the context of the 2002 biennial review proceeding, but the court struggled to understand the FCC's attempts at line drawing.[93]

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90 *See id.* at 13753, 13772.

91 *Prometheus*, 373 F.3d at 398.

92 *2002 Biennial Review Order*, 18 FCC Rcd at 13790-91.

93 *See Prometheus*, 373 F.3d at 411.

In the *2002 Biennial Review Order*, the Commission established a Diversity Index ("DI"), which attempted to measure the impact of different media on viewpoint diversity by assigning each medium a differing "weight" based on its alleged ability to influence consumers.[94] The FCC then used the index to draw a line between so-called "at-risk" markets and others.[95] The Third Circuit criticized the DI as irrational, and said that the FCC failed to justify the differing weights assigned to different media.[96] Even the *Notice* now concludes (albeit tentatively) that the DI is an "inaccurate tool for measuring diversity."[97]

Fox submits that there is really no reason for the Commission to become bogged down with the impossible – and inappropriate – task of attempting to assign varying weights to differing media. Instead, the FCC should apply the same rationale that it attempted to pursue with respect to the local TV ownership rule: since all media are equally capable of disseminating news, information and viewpoints, all media should be treated as equal participants in the marketplace of ideas.

It is an outlet's ability to add to discourse that renders it a contributor to the market, not its relative popularity as measured by consumer use at any moment in time. Perhaps the Commission believes that audience share is a valid proxy for an outlet's ability to reach consumers. In the Internet age, however, all outlets have an equal capacity to reach the vast majority of citizens (especially now that three-quarters of all American adults use the Internet). Moreover, as discussed above, any governmental attempt to favor or hinder speakers on the basis of their perceived popularity is constitutionally suspect. And

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94 *2002 Biennial Review Order*, 18 FCC Rcd at 13796-79, 13782

95 *See id.*

96 *Prometheus*, 373 F.3d at 402.

97 *Notice*, at ¶ 32.

maintaining structural ownership rules that distinguish among speakers based on popularity amounts to a government-imposed penalty on popular speakers.

If all media are treated equally, there is simply no basis for concluding in 2006 that a cross-ownership restriction is necessary in the public interest. Thus, whether pursuant to the Third Circuit remand or, more appropriately, the fresh look required by Section 202(h), the Commission should determine that cross-ownership limits are no longer necessary in the public interest.

IV. THE COMMISSION LACKS AUTHORITY TO MODIFY THE NATIONAL TELEVISION OWNERSHIP CAP – AND WITH IT THE UHF DISCOUNT – IN THIS PROCEEDING

A. Congress Has Insulated the UHF Discount from FCC Review During the Quadrennial Review Process

As demonstrated in comments submitted as part of the 2002 biennial review, Fox believes that the Commission is without power to modify or eliminate the national television ownership cap as part of this quadrennial review.[98] In Section 629 of the 2004 Consolidated Appropriations Act, Congress amended Section 202(c) of the 1996 Act and directed the Commission to modify the national television ownership rule by setting the cap at 39 percent.[99] Congress, however, did not alter in any way the definition of the term "national audience reach," choosing instead to affirmatively ratify the definition, and with it, the 50 percent UHF discount itself.

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98 *See In re 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 02-277, Comments Regarding the Status of the UHF Discount, submitted by Fox Entertainment Group, Inc. and Fox Television Stations, Inc., National Broadcasting Company and Telemundo Communications Group, Inc. and Viacom (March 19, 2004); Reply Comments Regarding the Status of the UHF Discount, submitted by the same parties (March 29, 2004); *see also* Letter from John C. Quale to Marlene Dortch, Secretary, FCC, transmitting *The UHF Discount*, dated May 20, 2003.

99 Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004) (the "Appropriations Act") (emphasis supplied).

The national television ownership rule provides that:

> *National audience reach* means the total number of television households in the Nielsen Designated Market Area (DMA) markets in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. *For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.*[100]

When the Commission first established a national television audience reach cap in 1984, "no mention was made of treating UHF stations any differently than VHF stations . . . ."[101] In response to several petitions for reconsideration, however, and in recognition of UHF stations' inherent technological and competitive disadvantages, the Commission created the UHF discount.[102] Accordingly, the discount has been an integral aspect of the administratively defined term "national audience reach" for 20 years.

The Appropriations Act is not the first time that Congress endorsed the definition of "national audience reach" together with the UHF discount. When Congress required the Commission to revise its national television ownership rule in 1996, it directed the FCC to "increas[e] the *national audience reach* limitation for television stations to 35 percent."[103] The text of the statute was silent as to the UHF discount, but legislative history makes clear that Congress not only adopted the FCC's national television ownership rule, but also that Congress affirmatively desired to retain the UHF discount encompassed in the rule:

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100 47 C.F.R. § 73.3555(e)(2).

101 *In Re Broadcast Television National Ownership Rules; Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules*, Notice of Proposed Rulemaking, 11 FCC Rcd 19949, 19951-52 (1996).

102 *See id.* at 19958

103 Telecommunications Act of 1996, Pub L. No. 104-104, 110 Stat. 56, § 202(c)(1)(B) (emphasis supplied).

> This section does not change the methodology for calculating 'national audience reach' currently employed by the Commission. For example, currently the audience reach of UHF stations is discounted. This 'UHF discount' appropriately reflects the technical and economic handicaps applicable to UHF facilities and the Committee *does not envision that the UHF discount calculation will be modified so as to impede the objectives of this section*.[104]

The Commission implemented the 1996 Act faithfully to Congress' directive. When it revised the national ownership rule shortly after passage of the 1996 Act, the FCC noted that the law "is silent with respect to the UHF discount . . . which [is] incorporated in the definition of 'national audience reach'" set forth in Section 73.3555 of the Commission's rules.[105] Consequently, the FCC said that the UHF discount, "as set forth in our current rules, will continue to apply."[106] In the Appropriations Act, Congress again used the defined term in directing the FCC to increase the "national audience reach limitation . . . ."[107]

The repeated use by Congress of a term that has had a clear administrative definition for 20 years plainly signifies its intent to adopt the administrative definition. Under long-defined principles of statutory construction, "Congress' repetition of a well-established term generally implies that Congress intends the term to be construed in accordance with pre-existing regulatory interpretations."[108] As the Third Circuit found in *Prometheus*, "when

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104 H.R. Rep. No. 104-204, at 118 (1995) (emphasis supplied).

105 *In Re Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership Rule and Dual Network Operations) 47 C.F.R. Sections 73.658(g) and 73.3555*, 11 FCC Rcd 12374, 12375 (1996).

106 *Id.*

107 Appropriations Act, at § 629. In amending Section 202(h) of the 1996 Act to provide for quadrennial rather than biennial reviews of the media ownership rules, the Appropriations Act yet again embraced the term "national audience reach." *See id.* (the new quadrennial review provision "does not apply to any rules relating to the 39 percent national audience reach limitation . . . .").

108 *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 193-94 (2002); *see also Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the

Congress uses an administratively defined term, it intend[s] its words to have the defined meaning."[109] Thus, modifying the UHF discount effectively would undermine the congressional goal of establishing the national cap at 39 percent.[110]

Moreover, as noted above, the Appropriations Act amended the 1996 Act by replacing the Commission's biennial media ownership review obligation with a mandate for quadrennial reviews.[111] In doing so, Congress explicitly said that the new quadrennial review provision "does not apply to any rules relating to the" national TV ownership cap.[112] Accordingly, the Commission is expressly barred by statute from considering any changes to the UHF discount – indisputably a rule relating to the national cap – as part of this proceeding.[113]

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meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.").

109 *Prometheus*, 373 F.3d at 396.

110 The legislative history of the Appropriations Act bolsters the conclusion that Congress did not intend to alter the UHF discount. Members of both the House and the Senate acknowledged in floor debate that Section 629 was not designed to force any licensee to divest stations as a result of the new level of the ownership cap. Several legislators noted that Congress had considered setting the ownership cap at 35 percent, which would have compelled divestitures in some cases. In contrast, they noted, the "practical effect" of Section 629 was to avoid compelling divestitures – a result that would have been impossible without retention of the UHF discount. *See, e.g.*, 150 Cong. Rec. S129 (daily ed. January 22, 2004) (statement of Sen. Feinstein); 150 Cong. Rec. S129 (daily ed. January 22, 2004) (statement of Sen. Leahy); 150 Cong. Rec. S66 (2004) (daily ed. January 21, 2004) (statement of Sen. McCain); 149 Cong. Rec. H12315 (2004) (daily ed. November 25, 2003) (statement of Rep. Obey).

111 *See* Appropriations Act, at § 629.

112 *Id.* (emphasis supplied).

113 *See also Prometheus*, 373 F.3d at 397. Because the "UHF discount is a rule 'relating to' the national audience limitation," the court said that "the UHF discount is insulated from this and future periodic review requirements." *Id.* Thus, the Commission is precluded from considering the UHF discount as part of any proceeding conducted pursuant to Section 202(h) of the 1996 Act.

B. The UHF Discount Remains a Vital Tool for Ensuring the Viability of UHF Broadcast Stations

In any case, absent repeal of the national television ownership cap altogether, the FCC should recognize that the UHF discount continues to serve the public interest by helping to ensure viability of UHF stations that face technological and financial obstacles in their ability to compete against VHF stations.

As an initial matter, Fox reiterates its belief that the national cap itself fails to further any of the Commission's public interest goals.[114] It bears no discernible relationship to promoting viewpoint diversity or localism, and it has no impact whatsoever on competition. As even the Commission recognized in 2003, since the cap is a national rule, it is irrelevant to the concept of viewpoint diversity.[115] "Consumers generally do not travel to other cities to obtain viewpoints. . . . The expression of viewpoints by television stations in one city does not appear to affect in any meaningful way the viewpoints available to people located in other cities."[116]

Furthermore, there is overwhelming evidence, developed as part of the 2002 biennial review proceeding, that the national cap certainly does not harm, and may in fact hinder the promotion of, localism. Fox submitted numerous studies, based on multivariate regression analyses, demonstrating that network-owned TV stations carry significantly more minutes of local news and public affairs programming than non-network-owned stations.[117] Equally

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114 *See Network Comments*, at 35.

115 *2002 Biennial Review Order*, 18 FCC Rcd at 13827.

116 *In the matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 17 FCC Rcd 18503, 18546 (2002); *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13827.

117 *See Network Comments*, at 35.

important, network-owned stations put in place capable local management teams to ensure that each station remains responsive to the tastes and interests of its local community.[118]

The FCC has made clear in other proceedings that television station ownership at the national level poses "no danger of excessive economic concentration" in any relevant market.[119] And evidence shows that precluding common ownership hinders the creation of efficiencies that otherwise would serve to enhance the public interest (by, for example, providing networks with resources to produce and acquire the highest quality, and highest cost, programming available).[120]

To the degree that the national cap remains in place, the Commission should accept that UHF stations continue to suffer from inherent technological inferiorities in their efforts to compete. For example, VHF stations today persist in having stronger coverage and greater audience reach than UHF stations.[121] Moreover, because the digital television technical rules are designed to ensure that DTV stations, even with maximization, replicate the signals of their analog counterparts, the completion of the digital transition will not eradicate the legacy problems facing former analog UHF stations.

Even if the transition results in a large number of VHF analog stations becoming UHF digital stations, that still would not eliminate the need for the discount. For one thing, until the transition is complete, it is impossible to know how well UHF digital stations will

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[118] *See id.*

[119] *See In Re Amendment of Section 73.3555 [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 17, 54 (1984).

[120] *See Network Comments*, at 43.

[121] *See* Letter from John C. Quale to Marlene Dortch, Secretary, FCC, dated May 20, 2003, at Attachments A, B and C.

perform. But given the replication/maximization rules, there will continue to be a class of stations that suffer from inferior coverage and signal characteristics. For these reasons, absent repeal of the national cap altogether, consideration of the status of the UHF discount at the very least should be postponed until the conclusion of the digital transition.[122]

CONCLUSION

In sum, Fox submits that the Commission should eliminate the legacy structural ownership regulations that tie the hands of broadcasters. As demonstrated above, the media marketplace of 2006 has become so robustly competitive, and offers so many diverse voices on subjects too numerous to count, that the broadcast ownership rules cannot possibly survive the scrutiny required by Section 202(h).

The Internet, in particular, has resulted in a complete transformation of the way that Americans consume and create content. Its competitive impact vitiates the Commission's assumptions and justifications underlying the ownership rules, and this quadrennial review presents the FCC with a fresh opportunity to take account of the transformed media marketplace. When it does so, Fox believes that the only rational conclusion for the Commission to make is to eliminate the media ownership rules once and for all.

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122 To be clear, Fox is not suggesting that the UHF discount be made applicable to analog VHF stations that ultimately become digital UHF stations. Rather, Fox believes only that the discount should continue to apply to formerly analog UHF stations even after the completion of the digital transition.

Respectfully submitted,

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October 23, 2006

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 06-121
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

REPLY COMMENTS OF CBS CORPORATION, FOX ENTERTAINMENT GROUP, INC. AND FOX TELEVISION STATIONS, INC., NBC UNIVERSAL, INC. AND NBC TELEMUNDO LICENSE CO., AND THE WALT DISNEY COMPANY

January 16, 2007

SUMMARY

In these joint reply comments, the Network Commenters urge the Commission to reject the calls of a few commenters for resurrection of the long-discredited Fin/Syn rules and imposition of programming set-asides, essentially quotas to protect so-called "independent" producers from competition. The Fin/Syn Proponents ask for a set-aside of time on the major broadcast networks for independent production, ignoring the judicial and Commission precedent that eviscerated any justification for government interference in the market for the distribution of video programming. These proposals are beyond the scope of the *Notice of Proposed Rulemaking* issued for this quadrennial review and, therefore, should be summarily dismissed. Furthermore, all of the Fin/Syn Proposals are premised on the notion of regulated "source diversity." In the *2002 Biennial Review Order*, however, the Commission found that government regulation was not necessary to promote source diversity because of the dramatic changes in the television market, including the significant increase in the number of channels available to most households.

As Dr. Bruce Owen demonstrates in his accompanying economic statement, the Fin/Syn Proposals make even less sense now than they did when the original regulations were struck down by the Court of Appeals in 1992. No matter how measured, the Fin/Syn Proponents cannot credibly claim that the economic power of the four leading broadcast television networks or media concentration is greater now than in the past. There is no sound basis for the federal government to reinsert itself into the business decisions of the networks, at the risk of raising costs and prices in the market, when neither horizontal concentration nor diversity concerns raise issues requiring such a risk. The case presented by the Fin/Syn Proponents falls far short of the compelling justification that the Commission would need to

revive its Fin/Syn (including program quota) requirements, and these proposals again should be rejected.

The FCC also lacks the authority to modify the UHF discount as part of this proceeding. Contrary to the claims of some commenters, the Appropriations Act, as interpreted by the Third Circuit, precludes such a review. The Commission should reconsider the rule, if at all, after the digital transition is complete. Only then can the FCC make an accurate assessment of the market and determine the degree to which legacy UHF stations continue to suffer disadvantages compared with their legacy VHF competitors. As part of any such review, the Commission also should rescind its earlier proposal sunsetting the discount for stations that are both owned and affiliated with one of the major networks, a decision reached before the Appropriations Act required it to lower the national ownership cap.

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FEDERAL COMMUNICATIONS COMMISSION
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REPLY COMMENTS OF CBS CORPORATION, FOX ENTERTAINMENT GROUP, INC. AND FOX TELEVISION STATIONS, INC., NBC UNIVERSAL, INC. AND NBC TELEMUNDO LICENSE CO., AND THE WALT DISNEY COMPANY

CBS Corporation ("CBS"), Fox Entertainment Group, Inc. and Fox Television Stations, Inc. ("FOX"), NBC Universal, Inc. and NBC Telemundo License Co. ("NBC"), and The Walt Disney Company ("ABC") (collectively the "Network Commenters") hereby submit their reply to the comments filed in response to the Federal Communications Commission's ("FCC" or "Commission") *Further Notice of Proposed Rulemaking*,[1] released in July 2006, initiating a

[1] *See In re 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8834 (2006) ("*Notice*").

comprehensive review of the media ownership rules in accordance with the requirements of Section 202(h) of the Telecommunications Act of 1996.[2]

I. THE ATTEMPTS BY COMMENTERS TO REVIVE THE PREVIOUSLY REJECTED FIN/SYN PROPOSALS ARE OUTSIDE THE SCOPE OF THIS PROCEEDING, INADEQUATELY SUPPORTED AND SHOULD BE DISMISSED

Ignoring judicial and Commission precedent that has eviscerated any justification for government-mandated source diversity, several parties ask the Commission to resurrect, in some form, its prior financial interest/syndication ("Fin/Syn") rules and to impose programming set-asides, essentially quotas to protect so-called "independent" producers from competition.[3] For example, the Independent Film & Television Alliance ("IFTA") proposes that networks "be limited to supplying 75% of their own programming . . . ."[4] The Screen Actors Guild, the Directors Guild of America, the Producers Guild of America, and the American Federation of Television and Radio Artists, AFL-CIO (collectively, the "Entertainment Guilds") propose a similar 25 percent independent producer rule for the major broadcast networks' primetime programming.[5] The Fin/Syn Proposals should be dismissed as both procedurally and

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2 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) (1996) ("1996 Act").

3 Consistent with the Commission's *2002 Biennial Review Order*, the Network Commenters refer to these various requests for some government mandated set-aside of network time or quota for independent production as the "Fin/Syn Proposals," and those advancing them as the "Fin/Syn Proponents." *See In re 2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, ¶ 640 (2003) ("*2002 Biennial Review Order*").

4 Independent Film & Television Alliance Comments, at iii. "In essence, IFTA requests that the Commission limit the amount of self-sourced programming that the major television networks may distribute on their primary networks, or on secondary or tertiary digital multicast channels. We also suggest these limits apply to cable program services owned, controlled by, or affiliated with either the major networks or the largest cable MSOs and DBS satellite system operators." *Id.* at ii-iii.

5 Entertainment Guilds Comments, at 24.

The Caucus for Television Producers, Writers & Directors ("TV Caucus") proposed a similar scheme: "We urge the FCC to adopt rules that: require 25% of all television programs be independently produced and owned by an independent source . . . ." TV Caucus Comments, at 1.

substantively deficient since they are beyond the scope of the Commission's *Notice* and fail to advance any valid purpose.

The Commission concluded that nearly identical proposals submitted in the 2002 biennial review were not responsive to the Notice of Proposed Rulemaking in that proceeding.[6] Likewise, the proposals submitted in the current proceeding are beyond the scope of the *Notice* for this quadrennial review and should be dismissed.[7] Not only do the Fin/Syn Proposals not belong in this proceeding, there is also no valid justification to revive these outdated policies.

The Fin/Syn Proposals are all premised on the notion of regulated "source diversity," which refers to the availability of media content from a variety of producers.[8] However, the era that spawned the rules, when television was dominated by three broadcast networks, passed long ago. Therefore, when considering many of the same Fin/Syn Proposals as part of the 2002 biennial review, the Commission concluded that source diversity should not be an objective of its ownership policies.[9] "In light of dramatic changes in the television market, including the significant increase in the number of channels available to most households today, we find no basis in the record to conclude that government regulation is necessary to promote source

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6 *See 2002 Biennial Review Order*, 18 FCC Rcd at ¶ 642.

7 *See, e.g., In re Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television*, 19 FCC Rcd 19331 (2004) ("We will not consider the . . . proposal because the issue was not addressed in the *Notice* and is therefore beyond the scope of this proceeding.").

8 *See 2002 Biennial Review Order*, 18 FCC Rcd at ¶ 42. The Commission's past efforts to regulate source diversity also focused on its Prime Time Access Rule ("PTAR"), which was eliminated when the Commission could not justify it in light of media marketplace changes. *See id.* (citing *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992) (remanding the Commission's decision to retain modified Fin/Syn rules, including independent programming set-aside requirements); *In re Review of the Syndication and Financial Interest Rules*, 10 FCC Rcd 12165 (1995) (eliminating the Fin/Syn rules)).

9 *See 2002 Biennial Review Order*, 18 FCC Rcd at ¶ 43.

diversity."[10] Since the current Fin/Syn Proponents fail to provide evidence to support renewed government regulation of source diversity, their proposals should also be rejected as part of this review.

Moreover, these ill-considered efforts to revive some form of the Fin/Syn rules are destined for failure since they cannot possibly survive judicial scrutiny. A brief review of the history of the Commission's Fin/Syn restrictions and an examination of the current program production market convincingly demonstrate that revival of any type of Fin/Syn requirement would be counterproductive and legally unsustainable.

The Commission originally adopted the rules in 1970 to curb what it perceived as the "excessive" power of the major broadcast networks.[11] In 1970, there were three broadcast networks collectively capturing some 90 percent of the nation's viewing audience each night;[12] cable was in its infancy; and direct broadcast satellite ("DBS"), and fiber-based video systems did not exist. Today, consumers can use these delivery systems to access as many as 530 different programming channels.[13] In addition, new technological developments like personal digital devices and the Internet provide potentially unlimited sources of video content. The Commission's rules, later replicated and enforced through consent decrees between the networks and the U.S. Department of Justice ("DOJ"), were based on the FCC's belief that the networks

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10 *Id.* at ¶ 44.

11 The rules specifically prohibited a broadcast network from (i) syndicating programs for rebroadcast by independent televisions stations, (ii) purchasing syndication rights to programs it obtained from outside producers, or (iii) obtaining any other financial stake in such programs. *See In re Evaluation of the Syndication and Financial Interest Rules,* Report and Order, 6 FCC Rcd 3094, ¶ 3 (1991) ("*1991 Report and Order*").

12 James L. Gattuso, et al., *Adjusting the Picture: Media Concentration or Diversity?*, Heritage Foundation Lecture #798, Oct. 7, 2003.

13 *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, ¶ 21 (2006) ("*Twelfth Annual Video Competition Report*").

would attempt to control the programming market to eliminate and forestall any future competition on the distribution side.[14] Seeking to strengthen independently-owned stations vis-à-vis the networks, the Commission mistakenly believed that the rules would protect these stations against having to purchase syndication rights from the networks.

The Commission first began a comprehensive review of its Fin/Syn rules in 1990 in response to a petition by FOX.[15] While acknowledging that dramatic changes had occurred in the television industry in the intervening 20 years, the Commission nonetheless concluded that the networks still exerted some level of market domination necessitating retention of modified Fin/Syn rules. The Commission also imposed an entirely new regulation with no counterpart in the original Fin/Syn rules, requiring the broadcast networks to purchase at least 40 percent of their primetime programming from independent producers. The 40 percent quota differed from a condition contained in the DOJ's consent decrees that required the networks to limit the hours of network-owned programming aired during the primetime schedule. The DOJ not only *supported elimination* of the FCC's Fin/Syn requirements in its comments during the Commission's review, it specifically objected to the 40 percent set-aside.[16]

The U.S. Court of Appeals for the Seventh Circuit vacated the Commission's revised Fin/Syn regulations on appeal, holding that the FCC had wholly failed to justify the rules in light of dramatic changes in the television marketplace. Writing for the court, Judge Posner observed that "profound" change had taken place in the industry and noted that the networks had "lost ground" in the preceding 15 years as a result of the "rapid growth" of the cable television

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14 *See Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1046 (7th Cir. 1992).

15 *See 1991 Report and Order*, 6 FCC Rcd 3094.

16 The Department of Justice's consent decrees were completely lifted by 1993.

industry.[17] Given these marketplace developments, the court questioned the justification and wisdom of further restraining the networks' competitive ability through the continuation and augmentation of the Fin/Syn and quota requirements.[18] The court's analysis also labeled as "never very clear" the Commission's original reasoning in adopting the Fin/Syn rules: that the broadcast networks would somehow leverage their distribution "monopoly" into the production market.[19] Indeed, the court in *Schurz* determined that "contrary to the intention behind the rules, yet an expectable result of them because they made television production a riskier business," the production of primetime programming under the Fin/Syn rules had become *more* concentrated.[20]

In 1993, the Commission greatly scaled back most of its Fin/Syn restrictions in response to the *Schurz* decision and also ordered the gradual sunset of the few remaining restraints, which occurred without fanfare in 1995.[21] The FCC recognized that the decline in network market share had continued unabated even between 1991 and 1993 due to the emergence of alternate programming options, including the burgeoning cable industry. Agreeing with the conclusion of the *Schurz* court, the Commission determined that these competitive alternatives served to "limit[] a network's ability to control the market or dictate prices for prime time entertainment programs."[22] Citing Judge Posner's analysis, the Commission concluded that the rules had

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17 *Schurz*, 982 F.2d at 1046, 1053.

18 *Id.*

19 *Id.* at 1046.

20 *Id*.

21 *See In re Evaluation of the Syndication and Financial Interest Rules, Second Report and Order,* 8 FCC Rcd 3282 (1993) ("*1993 Report and Order*"). The *1993 Report and Order* immediately removed the restrictions on network acquisition of financial interests and syndication rights in network primetime programming and the 40 percent cap on network in-house productions. Other restrictions were phased out more gradually. *See id.* at ¶ 12.

22 *Id*. at ¶ 45.

proven ineffective as the production community had actually become increasingly concentrated under the Fin/Syn regime.[23] In other words, far from aiding small independent producers, the rules favored those companies with pockets deep enough to withstand the high risks of producing entertainment programming for primetime network television. Thus, the Commission eliminated the Fin/Syn restrictions, finding that financial involvement by the networks would increase the chances "that this type of small producer can obtain financing."[24]

Notwithstanding the unfortunate results of past government interference in the program production market, the Fin/Syn Proponents again urge the Commission to require networks to reserve a percentage of their schedule for independently-produced primetime television programming. The Fin/Syn Proponents would also limit a network's financial interest in a program and preclude a network from controlling domestic syndication rights.[25]

In support of the its extraordinary request for a government mandated 25 percent set-aside for independent production, IFTA submitted with its comments a paper written by Dr. Mark Cooper, Director of Research at the Consumer Federation of America. However, as Dr. Bruce Owen, Morris M. Doyle Centennial Professor in Public Policy and Professor of Economics at Stanford University, demonstrates in his economic analysis attached hereto, Dr. Cooper's conclusion that "restricting competition in the manner proposed by IFTA will increase 'source diversity' . . . makes even less sense now than it did in the 1970 rules struck down by the Seventh Circuit in 1992."[26] Furthermore, given the Commission's determination in the *2002*

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[23] *Id.* at ¶¶ 17, 53.

[24] *Id*. at ¶ 51.

[25] *See* Entertainment Guilds Comments, at 25.

[26] Comments of Bruce M. Owen, at 2, attached hereto as Exhibit A.

Biennial Review Order that source diversity should not be a policy goal of its broadcast ownership rules, and the fact that the *Notice* fails even to mention source diversity, Dr. Owen correctly questions why Dr. Cooper now endorses government regulation to increase source diversity.[27]

As Dr. Owen explains, there is no valid basis for Dr. Cooper's claims that the networks' economic power or media concentration is greater now than it was in the past.[28] "Horizontal concentration is measured in a relevant market that makes sense from the point of view of customers (viewers and advertisers). It is inconceivable that concentration today, measured reasonably, could be anything but much less than in the years of fin/syn quotas."[29] As Dr. Owen notes, there is "no sound basis [for the Commission] to insert itself into the business decisions of individual distributors, at the risk of raising costs and prices in the market, when neither horizontal concentration nor diversity concerns remotely raise issues requiring such a risk."[30]

The Entertainment Guilds present an equally dubious case. They claim that independently produced programming aired on the primetime schedule for the Big 4 networks (ABC, CBS, FOX and NBC) has declined from 66 percent in 1992 to 24 percent today.[31] In fact, the Entertainment Guilds paint a picture of the program production market that bears no relationship to reality. Examination of the data on which the Entertainment Guilds rely demonstrates that they greatly understate the current role of independent production companies in primetime programming. For example, the Entertainment Guilds' calculations (contained in

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27 *Id.* at 3.

28 *Id.* at 3-4.

29 *Id.* at 4.

30 *Id.* at 6.

31 *See Entertainment Guilds Comments*, at 18, Attach. C.

Attachment C to their comments) exclude from the "independent producer" category those programs provided by studios affiliated with another network. These programs clearly should be counted as independently produced programs since the producer is entirely independent of the exhibiting network. Moreover, the Entertainment Guilds include news and sports programming in its computations, which makes no sense since there is no syndication market for these programs. And surely the Commission would not adopt a rule that penalizes networks for presenting informational programming in primetime. In any event, when shows produced by studios affiliated with another network and news/sports programs are excluded, the level of network-owned programming, based on the Entertainment Guilds' data, drops from 76 percent to 51 percent for the 2006-2007 season.

More importantly, the Entertainment Guilds treat as network-owned any program which is co-owned with an independent producer.[32] This too unfairly skews the data; there is no valid basis to discount independent producers merely because they work collaboratively with a network. To the contrary, repeal of the Fin/Syn rules has opened the door to a variety of independent companies that never could have afforded to participate in the program production market alone. Precisely as the *Schurz* court and the Commission predicted, elimination of the rules has made available to independent companies the capital resources of the networks, enabling them to break into the primetime schedule. When co-productions are excluded, along with news/sports, the networks produced only 35 percent of programming for the 2006-2007 primetime season. Furthermore, to the extent that there has been a drop in independent production on *broadcast* television, the Commission has already made clear: "the reduction in

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32 *See id.* at Attach. C (defining Networks or Affiliated Producer as "[n]etwork ownership or ownership by production company affiliated with ABC, CBS, Fox, [or] NBC for broadcast on its respective network").

independently produced prime time programming on a small subset of television networks is not, by itself, a public interest harm. Our concern is to promote the interests of consumers and viewers, not to protect the financial interests of independent producers."[33]

As these calculations prove, the *Schurz* court and Commission correctly predicted that market forces are far more effective in promoting program diversity than government regulation. Through cost sharing agreements with networks, independent producers are better able to undertake the enormous risk attendant to production of high-quality programs. The Entertainment Guilds' suggestion that non-network financing for independents will magically appear to fill the gap if a 25 percent set-aside is imposed defies both logic and the painful history of the rules.[34]

The Fin/Syn Proponents also ignore the acceleration of market trends that the *Schurz* court identified in 1992 and the Commission acknowledged in 1993. Broadcast television accounted for a combined average 47 share of primetime viewing among all television households during the 2004-2005 television season,[35] down a whopping 48 percent from the 90 percent share garnered by only three broadcast networks in 1970. Further, as the Network Commenters have demonstrated throughout the Commission's ongoing review of its broadcast ownership rules, with the continued growth of cable, DBS, video by telephone companies, the Internet and other video providers, the broadcast networks now face even greater competition from an array of programming alternatives. In fact, cable and other MVPDs already provide

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[33] *2002 Biennial Review Order*, 18 FCC Rcd at ¶ 651.

[34] *See* Entertainment Guilds Comments, at 26.

[35] *See Twelfth Annual Video Competition Report*, 21 FCC Rcd at ¶ 93 .

hundreds of programming services,[36] eroding the networks' share of the viewing audience.[37] In addition, the Fin/Syn Proponents ignore broadcast networks like the CW, MyNetwork TV and Ion. These networks, as well as cable networks, have profoundly changed the programming marketplace. Clearly, the so-called "Big 4" networks no longer remain the only viable option for primetime programming, and there is no need for intrusive regulation of their programming schedule.

As the Commission stated in the *2002 Biennial Review Order*: "When the Seventh Circuit affirmed the Commission's decision repealing all of the fin/syn rules, it questioned whether the rules 'ever had much basis' and cautioned that, if the Commission ever decided to re-impose similar restrictions, 'it had better have an excellent, a compelling reason' to do so. None appears on this record. Accordingly, we reject the Fin/Syn Proposals."[38] The Fin/Syn Proponents present an even weaker case today for these ill-conceived rules, and these proposals should again be dismissed.

II. THE FCC LACKS AUTHORITY TO MODIFY THE UHF DISCOUNT IN THIS PROCEEDING, AND THE COMMISSION SHOULD RECONSIDER THE RULE, IF AT ALL, ONLY AFTER THE DIGITAL TRANSITION

A. Congress Has Insulated the National Television Ownership Cap – and with It the UHF Discount – from the Quadrennial Review

Notwithstanding the clear import of the Consolidated Appropriations Act of 2004 ("Appropriations Act") as interpreted by the Third Circuit, Prometheus Radio Project

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36 *Id.* at ¶ 21 (noting that there were 531 satellite-delivered national programming networks in 2005).

37 *See, e.g., id.* at ¶ 93 ("As we reported last year, broadcast television stations' audience shares have continued to fall as cable and DBS penetration, the number of cable channels, and the number of nonbroadcast networks continue to grow.").

38 *2002 Biennial Review Order*, 18 FCC Rcd. at ¶ 656 (quoting *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309, 316 (7th Cir. 1994)).

("Prometheus") suggests that the Commission has the authority to consider in this docket whether to eliminate or modify the UHF discount pursuant to its general authority under the Communications Act of 1934.[39] Prometheus' position is fatally undermined by the clear language of the statute.

In Section 629 of the Appropriations Act, Congress amended Section 202(c) of the 1996 Act and directed the Commission to modify the national television ownership rule by setting the cap at 39 percent.[40] Congress, however, did not alter in any way the definition of the term "national audience reach," choosing instead to affirmatively ratify the definition, and with it, the 50 percent UHF discount itself.

The national television ownership rule provides that:

> *National audience reach* means the total number of television households in the Nielsen Designated Market Area (DMA) markets in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. *For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.*[41]

When the Commission first established a national television audience reach cap in 1984, "no mention was made of treating UHF stations any differently than VHF stations . . . ."[42] In response to several petitions for reconsideration, however, and in recognition of UHF stations' inherent technological and competitive disadvantages, the Commission created the UHF

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39 Prometheus Radio Project Comments, at 2.

40 Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004) (the "Appropriations Act") (emphasis supplied).

41 47 C.F.R. § 73.3555(e)(2) (emphasis supplied).

42 *In re Broadcast Television National Ownership Rules; Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules*, Notice of Proposed Rulemaking, 11 FCC Rcd 19949, ¶ 6 (1996).

discount.[43] Accordingly, the discount has been an integral aspect of the administratively defined term "national audience reach" for 20 years.

The Appropriations Act is not the first time that Congress endorsed the definition of "national audience reach" together with the UHF discount. When Congress required the Commission to revise its national television ownership rule in 1996, it directed the FCC to "increas[e] the *national audience reach* limitation for television stations to 35 percent."[44] The text of the statute was silent as to the UHF discount, but legislative history makes clear that Congress not only adopted the FCC's national television ownership rule, but also that Congress affirmatively desired to retain the UHF discount encompassed in the rule:

> [The 1996 Act] does not change the methodology for calculating 'national audience reach' currently employed by the Commission. For example, currently the audience reach of UHF stations is discounted. This 'UHF discount' appropriately reflects the technical and economic handicaps applicable to UHF facilities and the Committee *does not envision that the UHF discount calculation will be modified so as to impede the objectives of this section*.[45]

The Commission implemented the 1996 Act faithfully to Congress' directive. When it revised the national ownership rule shortly after passage of the 1996 Act, the FCC noted that the law "is silent with respect to the UHF discount . . . which [is] incorporated in the definition of 'national audience reach'" set forth in Section 73.3555 of the Commission's rules.[46] Consequently, the FCC said that the UHF discount, "as set forth in our current rules, will

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43 *See id.*

44 1996 Act, § 202(c)(1)(B) (emphasis supplied).

45 H.R. Rep. No. 104-204, at 118 (1995) (emphasis supplied).

46 *In re Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership Rule and Dual Network Operations) 47 C.F.R. Sections 73.658(g) and 73.3555*, 11 FCC Rcd 12374, ¶ 4 (1996).

continue to apply."[47] In the Appropriations Act, Congress again used the defined term in directing the FCC to increase the "national audience reach limitation . . . ."[48]

The repeated use by Congress of a term that has had a clear administrative definition for 20 years plainly signifies its intent to adopt the administrative definition. Under longstanding principles of statutory construction, "Congress' repetition of a well-established term generally implies that Congress intends the term to be construed in accordance with pre-existing regulatory interpretations."[49] As the Third Circuit found in *Prometheus*, "when Congress uses an administratively defined term, it intends its words to have the defined meaning."[50] Thus, modifying the UHF discount effectively would undermine the congressional goal of establishing the national cap at 39 percent.[51]

Moreover, as noted above, the Appropriations Act amended the 1996 Act by replacing the Commission's biennial media ownership review obligation with a mandate for quadrennial

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47 *Id.*

48 Appropriations Act, at § 629. In amending Section 202(h) of the 1996 Act to provide for quadrennial rather than biennial reviews of the media ownership rules, the Appropriations Act yet again embraced the term "national audience reach." *See id.* (the new quadrennial review provision "does not apply to any rules relating to the 39 percent national audience reach limitation . . . .").

49 *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 193-94 (2002); *see also Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.").

50 *Prometheus Radio Project v. FCC*, 373 F.3d 372, 396 (3d Cir. 2004).

51 The legislative history of the Appropriations Act bolsters the conclusion that Congress did not intend to alter the UHF discount. Members of both the House and the Senate acknowledged in floor debate that Section 629 was not designed to force any licensee to divest stations as a result of the new level of the ownership cap. Several legislators noted that Congress had considered setting the ownership cap at 35 percent, which would have compelled divestitures in some cases. In contrast, they noted, the "practical effect" of Section 629 was to avoid compelling divestitures – a result that would have been impossible without retention of the UHF discount. *See, e.g.*, 150 Cong. Rec. S129 (daily ed. January 22, 2004) (statement of Sen. Feinstein); 150 Cong. Rec. S129 (daily ed. January 22, 2004) (statement of Sen. Leahy); 150 Cong. Rec. S66 (2004) (daily ed. January 21, 2004) (statement of Sen. McCain); 149 Cong. Rec. H12315 (2004) (daily ed. November 25, 2003) (statement of Rep. Obey).

reviews.[52] In doing so, Congress explicitly said that the new quadrennial review provision "does not apply to any rules relating to the" national TV ownership cap.[53] Accordingly, contrary to Prometheus' contention, the Commission is expressly barred by statute from considering any changes to the UHF discount – indisputably a rule relating to the national cap – as part of this proceeding.[54]

B. So Long as the National Television Ownership Cap Remains in Place, Retention of the UHF Discount Is Essential to the Preservation of UHF Broadcast Stations

The Commission should recognize that because UHF stations continue to suffer technological and financial limitations that are not faced by their VHF competitors, the UHF discount is essential to the viability of UHF stations. Prometheus' argument that "[t]here is no longer any meaningful disparity between the reach of UHF and VHF television stations,"[55] is simply not supported by the facts. VHF stations today continue to have greater coverage and audience reach than UHF stations.[56]

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52 *See* Appropriations Act, at § 629.

53 *Id.* (emphasis supplied).

54 *See also Prometheus*, 373 F.3d at 397. Because the "UHF discount is a rule 'relating to' the national audience limitation," the court said that "the UHF discount is insulated from this and future periodic review requirements." *Id.* Thus, the Commission is precluded from considering the UHF discount as part of any proceeding conducted pursuant to Section 202(h) of the 1996 Act.

While the Appropriations Act prohibits the Commission from considering the UHF discount as part of this or any other quadrennial review proceeding, it does not bar the FCC from ever reconsidering the national cap or the UHF discount, as suggested by Univision. The language of the Appropriations Act makes clear that the FCC's authority is limited only within the context of a Section 202(h) periodic review. Nothing in the Act indicates that the FCC is barred from initiating an examination of its rules in another context.

55 Prometheus Comments, at 7.

56 *See Ex Parte* Letter from John C. Quale to Marlene Dortch, Secretary, FCC, dated May 20, 2003 (filed in MB Docket No. 02-277), Attachments A-C, VHF-UHF Grade B Signal Contour Comparisons. The exhibits demonstrate that the CBS, FOX and NBC/Telemundo owned and operated UHF stations suffer from the very same technological deficiencies that the Commission found in 1998.

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The Commission recognized in 2000 that weaker signals made it difficult for UHF stations to reach over-the-air viewers.[57] The FCC also acknowledged that cable television did not adequately ameliorate UHF stations' technological infirmities.[58] These conclusions remain equally relevant today. Nothing has changed with regard to UHF stations' technological disadvantages. And even though subscribership to MVPDs may have increased since 1998, this does not alter the fact that the signals of many UHF stations continue to fail to reach cable headends.[59]

The challenges are not limited to coverage, however. UHF stations are also more expensive to operate, particularly due to their higher power requirements, and remain less attractive to advertisers. Furthermore, because the digital television technical rules are designed to ensure that DTV stations replicate the signals of their analog counterparts, the completion of the digital transition will not eradicate the historic problems facing former analog UHF stations. Until the transition is complete, it is impossible to know how well UHF digital stations will compare with legacy analog VHF stations, many of which post-transition will operate on UHF channels. And while certain legacy UHF stations may be able to take advantage of the

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Specifically, as the networks demonstrated in 2003, (1) The average NBC/Telemundo-owned UHF station provides a Grade B signal reaching only 56 percent of the service area of the average same-market NBC/Telemundo-owned VHF station; (2) The average CBS-owned UHF station provides a Grade B signal reaching only 57 percent of the service area of the average same-market CBS-owned VHF station; and (3) The average FOX-owned UHF station provides a Grade B signal reaching only 61 percent of the service area of the average same-market FOX-owned VHF station. *Id.*

57 *See In re 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Biennial Review Report, 15 FCC Rcd 11058, ¶ 35 (2000) (the "*1998 Biennial Review Report*").

58 *See id.*

59 In addition, cable systems have successfully petitioned the Commission to reduce the market of many UHF stations for purposes of must carry based upon lack of signal coverage. *See, e.g.*, *In re Christian Faith Broadcast, Inc. v. Cablevision of Ohio; Request for Mandatory Carriage of Television Station, WGGN-TV Sandusky, Ohio*, Memorandum Opinion and Order, 15 FCC Rcd 9513 (2000).

Commission's rules permitting maximization of facilities, it is likely that there will continue to be a class of stations that suffers from inferior coverage and signal characteristics.[60]

For all of these reasons, consideration of the status of the UHF discount at the very least should be postponed until the conclusion of the digital transition.[61] And when and if the Commission does take up the UHF discount, it also should rescind its earlier proposal for a phased-in elimination of the discount, including a sunset of the discount for UHF stations affiliated with and owned by the top-four broadcast networks, because the Appropriations Act fundamentally altered the assumptions underlying that decision.[62]

Since the Appropriations Act modified the FCC's decision to increase the audience reach cap for the national television ownership rule, reducing it from 45 percent to 39 percent, the Commission must reconsider the sunset of the discount in the context of the new 39 percent ownership cap, or a cap at any other level, for that matter. When it decided to set the ownership cap at 45 percent, the FCC was aware that – even with a sunset of the UHF discount – none of

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60 *See* Letter from Paxson Communications Corporation to Marlene H. Dortch, MB Docket No. 02-277, at Attach. 1 (filed May 16, 2003) ("Although the FCC properly has noted that UHF broadcasters' ability to maximize their service area could be an equalizer between UHF and VHF stations, its decision to base the initial DTV Table of Allotments on a principle of replication of service has locked in the signal-coverage disparities of the analog world".).

In its opening comments, the Network Affiliated Stations Alliance ("NASA") expressed concern that the major networks may attempt to increase their station holdings by claiming the UHF discount for legacy VHF stations that wind up operating in the UHF band post transition. *See* NASA Comments, at 2-3. To clarify, the Network Commenters ask only that the Commission account for the challenges that *all* legacy UHF stations (regardless of ownership) will continue to face after the transition. Furthermore, legacy VHF stations should be attributed their full audience reach post transition regardless of their ownership or network affiliation.

61 *See* Entravision Comments, at 21 ("At this time, Entravision submits that the Commission should defer any further consideration of the UHF discount, including sunsetting the discount for the networks, until the completion of the digital transition.").

Capitol Broadcasting Company's request for an immediate review of the UHF discount should be delayed until the digital transition is complete because only then can the Commission adequately assess the market. *See Capitol Broadcasting Company, Inc.* Comments, at 6-7.

62 *See 2002 Biennial Review Order*, 18 FCC Rcd at ¶ 591.

the four affected networks would be required to divest any broadcast stations.[63] In contrast, with an ownership cap set at 39 percent as called for in the Appropriations Act, the elimination of the UHF discount would compel at least two of the networks to divest stations. Requiring the networks to divest stations abruptly would not only harm television viewers (by stripping stations from owners that have historically provided exemplary service – especially with respect to local news), it also would produce a result directly at odds with the goal of avoiding forced divestitures that the Commission expressed in its prior decision.

The FCC clearly lacks the authority to modify any aspect of the national ownership cap, including the UHF discount, as part of this proceeding. However, if the national ownership cap remains in place after the completion of the digital transition, the Commission should reassess the market at that time and take appropriate account of the continuing inferiority that will likely plague legacy UHF stations.

III. CONCLUSION

In sum, as the Commission reviews it broadcast ownership rules, it should take account of the robust and competitive media marketplace of 2006, which offers a panoply of diverse voices. And when it does, the Commission will recognize that it should reject the Fin/Syn Proposals as both procedurally and substantively deficient since they are beyond the scope of the *Notice* and fail to advance any valid purpose. In light of the dramatic changes in the television market, including the significant increase in the number of channels available to most consumers, a regulation premised on government imposed source diversity cannot stand.

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[63] The Commission expressly noted that one of its goals in revising the level of the ownership cap was to "accommodate all existing broadcast combinations . . . ." *2002 Biennial Review Order*, 18 FCC Rcd at ¶ 583.

The FCC also lacks the authority to address the UHF discount in this proceeding, and should reconsider the rule, if at all, after the digital transition is complete. It is only then that the FCC would be able to accurately assess the market and determine the degree to which legacy UHF stations continue to suffer disadvantages compared with their legacy VHF competitors. If and when the Commission does take up the UHF discount, it should rescind its earlier proposal sunsetting the discount for stations that are both owned and affiliated with one of the major networks, a decision reached before the Appropriations Act required it to lower the national ownership cap.

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